88-1650

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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

JONEZ P. SUTHOFF
FRANCES P. MILLER
INEZ W. PHILIBERT

PETITIONERS

VS.

YAZOO INDUSTRIAL DEVELOPMENT CORPORATION
YAZOO COUNTY, MISSISSIPPI
YAZOO COUNTY PORT COMMISSION
YAZOO CITY, MISSISSIPPI
YAZOO PUBLIC SERVICE COMMISSION
WILLIAM H. BARBOUR
TOM CAMPBELL, JR.
E. A. SMITH
WILLIAM T. NEELY
JOEL STEVENSON

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-4115

JONEZ P. SUTHOFF, ET AL.,

Plaintiffs-Appellants

VS.

YAZOO COUNTY INDUSTRIAL
DEVELOPMENT CORPORATION,
ET AL.,

Defendants-Appellees

Appeal from the United States District
Court for the Southern District of
Mississippi

(December 22, 1983)

Before COLEMAN, GARZA, and HIGGINBOTHAM,
Circuit Judges.

GARZA, Circuit Judge:

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983, alleging the deprivation of property rights under the Fifth and Fourteenth Amendments to the Constitution.

Plaintiffs appeal from the summary judgment granted defendants by the district court.

FACTS AND PROCEEDINGS BELOW

Plaintiff Inez Philibert was the owner of approximately 122 acres of land in Yazoo County, Mississippi. In January of 1970, E. A. Smith, a member of the Yazoo Public Service Commission (PSC), accompanied by an attorney acting for the Yazoo County Port Commission (Port Commission), visited Philibert and offered to purchase the property for $97,600. Philibert refused the offer, stating that she was not interested in selling the property . Smith contacted Philibert a number of times thereafter in an attempt to persuade her to sell the property, all to no avail. During this time, Philibert had retained attorney William Neely to represent her interests in her dealings with the land. Philibert alleges that in the late summer of that year, Smith again approached her, stating that if she continued to refuse to sell

the property, condemnation proceedings would be initiated and she would receive only a fraction of what he was offering her for the land. Philibert steadfastly refused to change her position.

On October 16, 1970, Philibert conveyed one-third undivided interests in the 122 acres to each of her two daughters, plaintiffs Suthoff and Miller. Attorney Neely agreed to represent their interests in the property as well.

In August, 1971, Tom Campbell, Jr., attorney for Yazoo City and the PSC, met with Philibert, Suthoff and Miller. He told them that an appraiser for Yazoo City had valued their property at $250 per acres, and he offered to buy 82.43 acres of the property for the sum of $22,500. This offer was likewise rejected. On September 2, 1971, Campbell filed a condemnation action on behalf of Yazoo City against Philibert, Suthoff and Miller, seeking to have 82.43 acres

of the property condemned for use in the construction and operation of a sewage treatment facility. On attorney Neely's advice, the women thereupon employed attorney William Barbour to associate with Neely in the representation of their interests in the property. Barbour was a board member of the Yazoo County Industrial Development Corporation (YIDC), and a member of its Executive Committee (a fact which plaintiffs claim not to have learned until 1979).

Barbour and Neely hired appraiser Joel Stevenson to appraise their client's property. In a letter dated October 8, 1971, Stevenson stated that as of September of that year, 99.25 acres of the plaintiff's property had a value of $100,850. Plaintiffs claim that they were refused a copy of Stevenson's appraisal. Plaintiffs allege that the property was actually worth more than $4,000 per acre, but that Barbour, acting in concert with the other defendants, had instructed Stevenson to report the lower

value to enable the defendants to purchase the property for less than one-fourth its actual value.

Plaintiffs further claim that attorneys Barbour and Neely told them, in effect, that they "could not fight city hall," and that if they did not sell the property to Yazoo County for $100,835, the Yazoo County Court would order it sold to Yazoo City for only $22,500. Under this belief, the plaintiffs deeded the entire 122 acres to Yazoo County on February 22, 1972, for $100,835, apparently believing they were conveying title to only 99.25 acres. Unknown to them, the condemnation action had been dismissed at Yazoo City's request on February 16, 1972.

Plaintiffs filed this action on February 16, 1979, almost seven years after the sale, seeking compensatory and punitive damages against Yazoo City, Yazoo County, the Yazoo Port Commission, YIDC and PSC; also, against E.A. Smith, attorneys Barbour, Neely and Campbell, and appraiser Stevenson.

Plaintiffs alleged numerous causes of action, including the deprivation of property without due process, fraud, deceit, abuse of process and breach of a fiduciary trust, and in the alternative for recission of the deed. The district court dismissed the complaint as failing to state a claim over which it had subject matter jurisdiction. We reversed and remanded, holding that the pleadings sufficiently alleged a federal claim within the district court's jurisdiction. See Suthoff v. Yazoo County Industrial Development Corporation., 637 F 2d 337 (5th Cir.), reh denied per curiam, 642 F 2d 822 (5th Cir. 1981).

On remand, after extensive discovery was had, the district court granted summary judgment in favor of all defendants. The court held that the action as against each defendant was barred by limitations; furthermore, that the doctrine of res judicata acted to bar the action against attorneys

Barbour and Neely. We are called upon in this appeal to decide which of Mississippi's statutes of limitations apply to this action, and whether the application of that statute or statutes acts as a bar to the prosecution of the action.

I.

Plaintiffs' complaint alleges claims arising under state law and under § 1983. Because no statute of limitations was specifically enacted to govern actions brought pursuant to § 1983, federal courts must "borrow" the state statute of limitations governing analogous causes of action. Board of Regents v. Tomanio, 446 U.S. 478 (1980); Drayden v. Needville Independent School District, 642 F 2d 129, 131 (5th Cir. 1981); Braden v. Texas A & M University System, 636 F 2d 90,92 (5th Cir. 1981). The district court characterized the plaintiffs' action as one based on an intentional tort for which there existed an adequate

remedy at common law, therefore finding applicable Mississippi's one-year limitations statute for intentional torts, Miss. Code Ann. §15-1-35(1972). That statute provides:

> All actions for assalt, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words, concerning the person or title, and for libels, shall be commenced within one year next after the cause of such action accrued, and not after.

The district court further stated that if it was incorrect in this regard, the action was nonetheless barred by Mississippi's six-year statute governing actions not otherwise specifically provided for, Miss. Code Ann. § 15-1-49 (1972)[1].

In determining which state limitations period controls, we must look to the essential nature, or "gravamen", of the complaint. Prince v. Wallace, 568 F 2d 1176 (5th Cir. 1978); Boshell v. Alabama Mental Health Board, 473 F 2d 1369 (5th Cir. 1973). Looking to the substance of the complaint in this instance, the plaintiffs allege that

the defendants conspired to have Yazoo City initiate proceedings to expropriate the plaintiffs' property for sewerage purposes, in order to coerce plaintiffs into selling their property at a fraction of its value to Yazoo County. This was allegedly done to enable the Port Commission and the YIDC to utilize the property for public purposes. The cause of action under Mississippi law most analogous to the plaintiffs' claim is that of "abuse of process", being "the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, and with resulting damages." Hyde Construction Co., Inc. v. Koehring Company, 387 F Supp 702, 712-13(S.D. Miss. 1974), modified but cited with approval sub nom., Dunn v. Koehring Company, 546 F 2d 1193, 1199 n.19 (5th Cir.), modified sub nom., Hyde Construction Co., Inc. v. Koehring Co., 551 F 2d 73 (5th Cir.

1977); See also Wilcon, Inc. v. Travelers Indem. Co. 654 F 2d 976, 983-84 (5th Cir. 1981).

Review Mississippi's various limitations statutes, only two appear to have possible application to actions brought for abuse of process. They are Miss. Code Ann. § 15-1-35 (1972), providing the one-year period for intentional torts found applicable by the district court; and, Miss. Code Ann. § 15-1-49 (1972), providing the six-year "catch-all" provision for actions not otherwise provided for. As previously noted, plaintiffs' action would be untimely under either. Although some authority supports application of the six-year statute, See Hyde Construction Co., Inc. v. Koehring Company, supra. 387 F Supp 702 at 712 (applying the six-year statute to an abuse of provess action), the greater weight of authority is in favor of the one-year statute. See Dennis v. Travelers Insurance Co., 234 So 2d 624,626

(Miss. 1970) (abuse of criminal process held to come within definition of "menace" in one-year statute); Rigby v. Roadway Exp., Inc., 680 F 2d 342, 344 (5th Cir. 1982)(one-year statute applied to wrongful discharge action against employer, although not specifically provided for); Childers v. Beaver Dam Plantation, Inc., 360 F Supp 331,333 (N.D. Miss. 1973)(one-year statute applied to action for malicious prosecution, abuse of criminal process, libel and slander); Andrews v. G A B Business Services, Inc., 443 F Supp 510, 513 (N.D. Miss. 1977)(one-year statute applied to invasion of privacy action, although not specifically provided for). In our opinion the plaintiffs' complaint was properly characterized by the district court as alleging an action governed by Mississippi's one-year intentinal tort statute.

Plaintiffs argue that the action is one for the breach of a fiduciary trust. The

complaint does not allege "the existence of a trust not cognizable by the courts at common law...," within Miss. Code Ann. § 15-1-39 (1972)[2], however, nor do the facts alleged involve the type of trust contemplated by that statute. Plaintiffs also state that the complaint charges breaches of official duties rather than an intentional tort, referring to our decisions of Morrell v. City of Picayune, 690 F 2d 469 (5th Cir. 1982) and Shaw v. McCorkel, 537 F 2d 1289 (5th Cir. 1976). Both were § 1983 actions brought against law enforcement officers for physical abuse. Relying on State v. Smith, 156 Miss. 288, 125 So. 825 (1930), we held in each case that the action was essentially one against public officers and the sureties on their bonds, and therefore held applicable the six-year "catch-all" statute governing written contracts. The facts in the instant case are far removed from those in the cited cases,

however, and plaintiffs have not referred us to any case more factually aligned with the case at bar. We decline to hold that Mississippi's courts would apply the six-year statute to the facts of this case based on its decision in Smith, supra.

Plaintiffs further argue that the action is in the alternative one to recover land, within Mississippi's ten-year statutes, Miss. Code Ann. §§ 15-1-7 and 15-1-9 (1972),[3] and was therefore timely filed. Although the ten-year period for the recovery of land has been applied in two actions in Mississippi to set aside conveyances allegedly procured by fraud, the Mississippi courts have not decided the precise issue raised, i.e., whether such an action is governed by the statute relating to actions for fraud or the statute relating to actions to recover land. See Ayers v. Davidson, 285 F 2d 137 (5th Cir. 1960); Aultman v. Kelly, 109 So 2d 344 (Miss. 1959). This issue was the

subject of an Annotation in 118 A.L.R. 196 (1939), which concluded that the majority of jurisdictions deciding the issue have held that "a suit brought by one not in possession of land to obtain a decree setting aside a deed thereof as having been procured by fraud is one for relief on the ground of fraud, rather than an action for the recovery of real property." Annot., 118 A.L.R. 196,200(1939). Furthermore, the complaint seeks compensatory and punitive damages, inconsistent with an action to recover land, and is directed against ten defendants, only one of which holds title to the property. For these reasons, we are of the opinion that the plaintiffs' alternative claim is, at best, governed by the six-year statute and therefore untimely filed.

II.

Having determined the applicable limitations period, we must next determine whether

the present action is barred. It is undisputed that the action in question was not filed until nearly 7 years after the date of the conveyance to Yazoo County. Plaintiffs argue, however, that the running of the statute was tolled by the defendants' fraudulent concealment. Mississippi's fraudulent concealment statute, Miss. Code Ann. § 15-1-67 (1972) provides:

> "If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered."

Plaintiffs' allegations of fraudulent concealment are directed primarily at defendants Barbour and Neely. Although plaintiffs mention various facts which they allege were concealed from their knowledge by these defendants, in the words of the statute it is the concealment of the cause of action that acts to toll the running of the limita-

tions period, rather than the failure to appraise the plaintiff of individual items of information not material to the cause of action. Plaintiffs' primary allegation in this regard is that Barbour and Neeley failed to disclose Barbour's official association with the YIDC, a fact plaintiffs claim not to have learned until January 25, 1979, approximately three weeks prior to their filing the lawsuit.

The uncontroverted summary judgment evidence, however, taken from plaintiff Suthoff's own deposition testimony, reflects that Barbour's name was mentioned as a member of the YIDC Executive Committee in a November 10, 1971, article concerning the proposed sewage disposal plant in the People's Press, a Yazoo City newspaper; further, that Suthoff read the article shortly after it was printed and underlined Barbour's name where it appeared in the article. Plaintiffs have not alleged that

Barbour or Neely actively concealed the fact of Barbour's association with the YIDC. While the attorney-client relationship is one of special trust and confidence, imposing on the attorney a duty to disclose any interest that may adversely effect his ability to represent the client, it does not follow that a breach of that duty necessarily results in fraudulent concealment within the meaning of the tolling statute. Further, plaintiffs have not complained of any action taken by any defendant subsequent to the date of the conveyance which is alleged to have concealed the existing cause of action. We do not find that the plaintiffs have raised a fact issue of fraudulent concealment within Miss. Code Ann. § 15-1-67 (1972).

Plaintiffs next assert that the district court erred by looking to Mississippi law in determining the date the plaintiffs' cause of action accrued, incorrectly find-

ing that date to be February 22, 1972, the date of the conveyance in question. Under federal law, a cuase of action under § 1983 accrues "when [the] plaintiff knows or has reason to know of the injury which is the basis of the action." Cox v. Stanton, 529 F 2d 47 (4th Cir. 1975); accord., Lavellee v. Listi, 611 F 2d 1129, 1131 (5th Cir. 1980). In our opinion the district court properly found that to be February 22, 1972. The alleged injury occurred on that date and Mrs. Suthoff's deposition testimony clearly indicates that at that time she was convinced the condemnation action was a pretense and that attorneys Barbour and Neely were "tricking" the women. (Addendum to Breif of Appellees, pp. 14-22).[4] Mrs. Suthoff had also expressed these beliefs to other counsel prior to the date of the sale. Id. The record also reflects that plaintiffs had complained to the Mississippi State Bar about these matters in 1975, and

filed a professional malpractice action against Barbour and Neely in February, 1978. Id.

Plaintiffs also argue that because of the attorney-client relationship existing between themselves and Barbour and Neely, defendants are estopped to plead limitations as a defense to this action. Plaintiffs have cited no Mississippi authority in support of this contention, nor has our research revealed the same. The law of Mississippi appears to be that, in the absence of fraudulent concealment, the statute of limitations will act to bar an untimely action by the client against his or her attorney. See Hudson v. Kimbrough, 20 So 885 (Miss. 1896).

Plaintiff's final contention is that the district court erred in holding that the action as against Barbour and Neely was also barred by the doctrine of res judicata. As previously mentioned, the plaintiffs

filed a malpractice suit in the Mississippi Circuit Court against the attorneys in February, 1978. The suit was dismissed by the circuit judge, although it is unclear whether the court sustained the defendant's general demurrer or dismissed the action because of the plaintiffs' failure to appear at a docket setting. The district court in the instant action held that the dismissal was on the merits and consequently precluded the action against Barbour and Neely. Since we have held that the statute of limitations bars the action as against all defendants, however, it is unnecessary to resolve this issue.

AFFIRMED.

1. Miss. Code Ann. § 15-1-49(1972), provides:

> All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after."

2. Miss. Code Ann. § 15-1-39 provides, in pertinent part:

> Bills for relief, in case of the existence of a trust not cognizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after..."

3. Miss. Code Ann. § 15-1-7 provides, in pertinent part:

> A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued..."

§ 15-1-9 provides:

> A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity.

However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

4. Excerpts from the May 4-5, 1982, deposition of plaintiff Suthoff are reproduced in the Addendum to the Brief of Appellees Yazoo County, YIDC, and the Port Commission. While the Court was not provided a copy of this deposition, appellants have not objected to the accuracy or the use of the deposition excerpts by counsel.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JONEZ P. SUTHOFF, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. J79-0078(N)

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, ET AL. DEFENDANTS

OPINION OF THE COURT

The Complaint in this case cites 42 U.S.C. § 1983 as the basis for invoking federal court jurisdiction under 28 U.S.C. § 1331 and 1343 alleging that the several defendants unlawfully conspired to deprive the plaintiffs of their lands in Yazoo County, Mississippi, without adequate compensation.

All defendants have filed pleas that the action is time barred under the Mississippi one year and six year statute of limitations citing § 15-1-35 and § 15-1-49, Miss. Code Ann. (1972), which is the basis for a

motion for summary jdugment in which all defendants join and which is now before the Court for decision.

Additionally, two of the defendants, Barbour and Neely, the attorneys who represented the plaintiffs in the defense, negotiations and sale, filed a plea of res judicata and have brought on a motion for summary judgment on the ground that this action is barred by the doctrine of res judicata by a prior judgment in state court.

FINDINGS OF FACT

Based upon the pleadings and upon the depositions and upon the affidavits filed, incluidng relevant exhibits, the Court finds as facts:

A. LIMITATIONS ISSUE

There exists no genuine issue as to any material fact and defendants are entitled to summary judgment as a matter of law.

This action is one based upon an intentional tort, for which there is an ade-

quate remedy at common law.

The alleged cause of action accrued in February of the year 1972 when the plaintiffs executed their Warranty Deed dated February 18, 1972, conveying the land in question to Yazoo County, Mississippi, and received from the grantee the sum of $100,830.00.

On their depositions, the plaintiffs testified to an awareness in 1971 and in 1972 of the alleged wrongs against them and during this period even attempted unsuccessfully to employ another attorney in the person of one John Poole. The Court concludes that plaintiffs either knew the facts underlying their present claims or should have known of facts to be on notice but nevertheless delayed the filing of this action for more than six years thereafter.

There was no concealment or concealed fraud by any of the defendants and the running of the statutes of limitations was not tolled on the facts in this case.

The plaintiffs have retained the money paid to them by Yazoo County in exchange for their deed. Yazoo County took possession of the land deeded to it and valuable improvements have been made on the property.

B. RES JUDICATA ISSUE

There exists no genuine issue as to any material fact and defendants are entitled to summary judgment as a matter of law.

In February, 1978, the same three plaintiffs filed their declaration in an action, No. 24,693, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, naming Barbour and Neely as defendants. It was alleged, among other things, that Barbour and Neely had not adequately represented the plaintiffs in the land transaction and "that Barbour and Neely had failed and neglected to remain loyal and vigilant to plaintiffs' interests", thereby violating their employement contract and agreement to do so. The suit

sought to recover damages from these two defendants.

The defendants filed a joint general demurrer asking that the case be dismissed and when the case came on for trial, renewed their request for dismissal orally, and the Court entered its judgment of dismissal on October 9, 1978. That judgment became final under Mississippi law and was never appealed, set aside or vacated.

CONCLUSIONS OF LAW

The court announces its conslusions of law as follows:

A. LIMITATIONS ISSUE

Since this action is one based on an intentional tort, the Mississippi one (1) year statute of limitations is applicable and the action is barred as provided in § 15-1-35, Miss. Code Ann. (1972). The Court agrees with the decision in Childres v. Beaver Dam Plantation, 360 F Supp 331 (N.D. Miss. 1972), holding that the one

(1) year statute applies under Mississippi law to intentional torts.

Even if mistaken as to the applicability of the one (1) year statute, then the Mississippi six (6) year statute of limitations is applicable as provided in § 15-1-49, Miss. Code Ann. (1972).

As to the plaintiffs' contention that these time statutes were tolled by reason of concealed fraud, the finding of the Court is that the plaintiffs knew or should have known of the existence of facts sufficient to put them on notice in the years 1971-1972 and the six (6) year statute has run and has barred their cause of action.

The Court finds persuasive Dunn v. Dent, 169 Miss. 574, 153 So 798 (1934), applying the six (6) year statute, along with Childres v. Beaver Dam Plantation, supra, applying the one (1) year statute of limitations.

The Court finds inapplicable the ten (10) year statute dealing with bills for

relief, (§ 15-1-39). This is not the type of action contemplated by that statute, because in this case, there is an adequate remedy at common law. (§ 15-1-39).

B. RES JUDICATA ISSUE

The essential elements for the prior state court decision to constitute res judicata are all present. The allegations in the state court decision went beyond negligence and smack of the same allegation being made here.

The Court finds persuasive, Pray v. Hewitt, 254 Miss. 20, 179 So 2d 843, 844 (1965). The judgment is conclusive not only on the questions actually contested and determined, but concludes all matters which could be litigated therein. Pray v. Hewitt, supra; Schwartz Brothers & Co. v. Stafford, 166 Miss. 397, 148 So 2d 794 (1933); Golden v. Golden, 246 Miss 562, 151 So 2d 598 (1963).

The granting of a general demurrer does constitute judgment on the merits. The

order of dismissal is with prejudice in any event. Ross v. Milner, 194 Miss 497, 12 So 2d 917 (1943); Strain v. Gayden, 197 Miss. 353, 365, 20 So 2d 697, 700(1945); Balfour v. Wells, 183 707, 183 So 392 (1938); Williams v. Patterson, 203 Miss. 865, 34 So 2d 366 (1948); Neill v. Wells, 164 Miss. 372, 145 So 341 (1933); Straw v. Illinois Central Railroad Co., 73 Miss 446 18 So 847 (1895); Shaw v. Laurel Oil & Fertilizer Co., 92 Miss. 340, 45 So 878 (1908); Delta Construction Co. of Jackson v. City of Jackson, 198 So 2d 592, 605 (1967).

The judgment constitutes a bar against these plaintiffs bringing the present case agasint the same two defendants in federal court.

CONCLUSION

The motion of all defendants for summary judgment based upon the plea of time limitations is sustained and the motion of the two defendants, Neely and Barbour, based

on the plea of res judicata is sustained and judgment may be entered accordingly in favor of the defendants, Yazoo County Industrial Development Corporation; Yazoo County, Mississippi, Yazoo County Port Commission; Yazoo City, Mississippi; Yazoo Public Service Commission; William H. Barbour; Tom Campbell, Jr.; E.A. Smith; William T. Neely and Joel Stevenson, providing that the plaintiffs, Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert shall have and recover nothing by their action and that the Complaint be dismissed in favor of all of said defendants jointly and separately and with prejudice to the plaintiffs.

SO ORDERED on this the 2nd day of February, 1983.

s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JONEZ P. SUTHOFF,
FRANCES P. MILLER
AND INEZ W. PHILIBERT — PLAINTIFFS

V. — CIVIL ACTION NO. J79-0078(N)

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION: YAZOO COUNTY, MISSISSIPPI; YAZOO COUNTY PORT COMMISSION; YAZOO CITY, MISSISSIPPI; WILLIAM H. BARBOUR; TOM CAMPBELL, JR.,; E.A. SMITH; WILLIAM T. NEELY AND JOEL STEVENSON — DEFENDANTS

FINAL JUDGMENT

This cause came on to be heard on the motion of defendants for summary judgment on the plea of each defendant that the action is time barred by relevant statutes of limitations and the Court having heard the motion on the pleadings and on the

depositions and on the affidavits filed, including relevant exhibits, and having heard the arguments of counsel and finding that there is no genuine issue of fact and that all defendants are entitled to judgment as a matter of law and finding that the motion is well taken and should be sustained;

IT IS ORDERED AND ADJUDGED that the plaintiffs, Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert do have and recover nothing by their action in this cause and that their Complaint be and it is hereby finally dismissed with prejudice to the plaintiffs and in favor of the defendants, Yazoo County Industrial Development Corporation; Yazoo County, Mississippi; Yazoo County Port Commission; Yazoo City, Mississippi; Yazoo Public Service Commission; William H. Barbour; Tom Campbell, Jr.; E.A. Smith; William T. Neely and Joel Stevenson. The costs will be assessed against the plaintiffs.

SO ORDERED on this the 2nd day of February, 1983.

Walter L. Nixon, Jr.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM ONLY:

Dixon L. Pyles
Attorney For Plaintiffs

Vardaman S. Dunn
Attorney For Defendants

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JONEZ P. SUTHOFF, FRANCES P. MILLER AND INEZ W. PHILIBERT — PLAINTIFFS

VS. CIVIL ACTION NO. J79-0078(N)

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; YAZOO COUNTY, MISSISSIPPI; YAZOO COUNTY PORT COMMISSION; YAZOO CITY, MISSISSIPPI; YAZOO PUBLIC SERVICE COMMISSION; WILLIAM H. BARBOUR; TOM CAMPBELL, JR.; E.A. SMITH; WILLIAM T. NEELY AND JOEL STEVENSON — DEFENDANTS

FINAL JUDGMENT

This cause came on to be heard on the motion of defendants, William H. Barbour and William T. Neely on the plea of each of these defendants that the action is barred by the doctrine of res judicata by a prior judgment entered in Cause No. 24,693 in the

Circuit Court of the First Judicial Distirct of Hinds County, Mississippi, and the Court having examined the state court proceedings and judgment and having heard the arguments of counsel and finding that there is no genuine issue of fact and that these defendants are entitled to judgment as a matter of law on their plea of res judicata and that the motion for summary judgment is well taken and should be sustained;

IT IS ORDERED that plaintiffs, Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert do have and recover nothing by their action in this cause against the defendants, William H. Barbour and William T. Neely and that their Complaint as to these defendants is hereby finally dismissed with prejudice to the plaintiffs and in favor of said defendants. The costs will be assessed against the plaintiffs.

SO ORDERED on this the 2nd day of February, 1983.

Walter L. Nixon , Jr.
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM ONLY:

Dixon L. Pyles
Attorney For Plaintiffs

Vardaman S. Dunn
Attorney For Defendants

APPENDIX V

CONSTITUTION OF THE UNITED STATES
FIFTH AMENDMENT

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or propery, without due process of law; nor shall private property be taken for public use, without jsut compensation.

APPENDIX VI

CONSTITUTION OF THE UNITED STATES
FOURTEENTH AMENDMENT

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX VII

42 U.S.C., § 1983

§ 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usuage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the

District of Columbia.

APPENDIX VIII

42 U.S.C., § 4651

§ 4651. UNIFORM POLICY ON REAL PROPERTY ACQUISITION PRACTICES

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to

accompany the appraiser during his inspection of the property.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the

property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 258a of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction of development of a public improvement shall be so scheduled

that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by subchapter II of this chapter will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no enent shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in

court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property.

APPENDIX IX

42 U.S.C., § 4655

§ 4655. REQUIREMENTS FOR UNIFORM LAND ACQUISITION POLICIES: PAYMENTS OF EXPENSES INCIDENTAL TO TRANSFER OF REAL PROPERTY TO STATE; PAYMENT OF LITIGATION EXPENSES IN CERTAIN CASES

Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such State agency that--

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land

acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

APPENDIX X

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-9. LIMITATIONS APPLICABLE TO SUITS IN EQUITY TO RECOVER LAND.

A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity. However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonalbe diligence might, have been first known or discovered.

APPENDIX XI

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-35. LIMITATIONS APPLICABLE TO ACTIONS FOR CERTAIN TORTS.

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, and for libels, shall be commenced within one year next after the cause of such action accrued, and not after.

APPENDIX XII

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-39. LIMITATIONS APPLICABLE TO ACTIONS INVOLVING CERTAIN TRUSTS.

Bills for relief, in case of the existence of a trust not coznizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after, saving, however, to all persons under disability of infancy or unsoundness of mind, the like period of time after such disability shall be removed. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

APPENDIX XIII

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-49. LIMITATIONS APPLICABLE TO ACTIONS NOT OTHERWISE SPECIFICALLY PROVIDED FOR.

All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

APPENDIX XIV

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-67. EFFECT OF FRAUDULENT CONCEALMENT OF CAUSE OF ACTION.

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be or with reasonable diligence might have been, first known or discovered.

APPENDIX XV

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-69. COMMENCEMENT OF NEW ACTION SUBSEQUENT TO ABATEMENT OR DEFEAT OF ORIGINAL ACTION.

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

APPENDIX XVI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ROY HARRIS — PLAINTIFF

V. — CIVIL ACTION NO. S81-0553(R)

COMBINED INSURANCE COMPANY OF NORTH AMERICA — DEFENDANT

MEMORANDUM OPINION

Presently before this Court for consideration is the defendant Combined Insurance Company of North America's (Combined) motion for partial summary judgment. The plaintiff (Harris) alleged that Combined breached its insurance contract by ceasing the payment of monthly disability benefits to the plaintiff. Included in the suit was a claim for punitive damages.

The alleged breach occured on or about February 28, 1980. This suit was filed in October, 1981. Therefore, Combined contends,

the claim for punitive damages is barred by the Mississippi statute of Limitations for intentional torts[1] and by a limitations statute designed for suits for penalty[2]. Both of these statutes provide for a one year limitatios period. Combined's argument is that in actions for tortious breach of an insurance contract, punitive damages are not recoverable unless the insurer's breach of contract is attended by "an intentional wrong, insult, or abuse, or such gross negligence as amounts to an independent tort," Gulf Guaranty Life Ins. Co. v. Kelley, 392 So 2d 519 (Miss. 1980). Therefore, the one year statute of limitations would apply and the plaintiff's punitive damage claim is barred. In response the plaintiff urges that Miss. Code Ann. § 15-1-35 (1983) contains an inclusive listing of intentional torts which does not include tortious breach of contract. Therefore the six year statute would apply to an action for

tortious breach of an insurance contract in which punitive damages are requested.

Combined additionally relies on Miss. Code Ann. § 15-1-33 (1972), which allows a suit on a penalty within one year. Reasoning that punitve damages are "penalties," Combined urges that the statute should bar the action.

It is the opinion of this Court that neither statute is applicable in the instant action. The theory which results in reliance on § 15-1-35 is based on the standard for an award of punitive damages. In Mississippi, this standard has been most recently enunciated as follows: "Punitive damages are not recoverable for the breach of a contract unless such breach is attended by intentional wrong, insult, abuse of such gross negligence as to consist of an independent tort." Consolidated American Life Insurance Co. v. Toche, 410 So 2d 1303,1304 (Miss. 1982); Standard Life Insurance Co. of

Indiana v. Veal, 354 So 2d 239, 247 (Miss. 1977); Progressive Casualty Insurance Co. v. Keyes, 317 So 2d 396 (Miss. 1975). In earlier cases, the language was substantially the same; the court merely used the word "tort" in lieu of "independnet tort". D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So 770, 773 (1944); American Railway Express Co. v. Bailey, 142 Miss. 622, 107 So 761, 763 (1926). In Seals v. St. Regis Paper Co., 236 So 2d 288,392 (Miss. 1970), the Mississippi Supreme Court stated that "]p]unitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." The court has also said that there must be "some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others to be appropriate. Fowler Butane Gas Co. v. Varner, 244 Miss 130, 141 So 2d 226,

33 (1962). This standard has been applied by the federal courts. Vogel v. American Warranty Home Service Corp., 695 F 2d 877, 883 (5th Cir. 1983); Felts v. National Account Systems Association, Inc., 469 F Supp 54,69 (N.D. Miss. 1978); Michael v. National Security Fire and Casualty Co., 458 F Supp 128, 131 (N.D. Miss. 1978). In one case, Andrews v. GAB Business Services, Inc., 443 F Supp 510, 516(N.D. Miss. 1977), the Mississippi Supreme Court was quoted as having held that punitives were not recoverable unless "the breach [was] attended by some intentional wrong, insult, abuse or gross negligence, which amounts to an intentional tort." (emphasis added). However, this is not what Mississippi cases have held. The language has consistently been "independent tort," which embraces all torts, not simply the intentional ones. Combined has likewise equated "independent tort" with "intentional tort." However, the

Court is of the opinion that the term "independent tort" embraces all torts, not merely intentional ones. Application of § 15-1-35 to a request for punitive damages would be overly restrictive and would result in misapplication of clear legislative intent.

This Court is not unaware of the opinion in Short v. Metropolitan Life Insurance Co., Civil Action S82-0012(N) (S.D. Miss. Sept. 2, 1982). While the court addressed this issue and stated that the one year statute of limitations would be applicable to the plaintiff's claim for punitive damages, this assertion was merely dictum; it was not necessary to "reach a decision on the statute of limitations issue to reach a final disposition of this cause." Short, slip op. at 6.

. With respect to § 15-1-33 the state court held that "this section reveals by its plain terms that it applies only to suits for any

penalty or forfeiture based on a penal statute..." Latham v. United States Fidelity & Guaranty Co., 267 So 2d 895, 897 (Miss. 1972). The instant action is not based on a "penal statute." Therefore, it is this Court's opinion that the one year limitation found in the section has no application here.

On the basis of the foregoing, the defendant's motion should be, and hereby is denied.

An order in accordance with the opinion of this Court shall be provided as set forth in the Local Rules.

This the 27th day of February, 1984.

Dan M. Russell, Jr.

UNITED STATES DISTRICT JUDGE

NOTES

1. MISS. CODE ANN. § 15-1-35(1983) provides:

> Limitations Applicable to Actions For Certain Torts.
>
> All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

2. MISS. CODE ANN. § 15-1-33(1972) provides:

> Limitations Applicable To Actions And Suits For Penalty For Forfeiture.
>
> All actions and suits for any penalty for forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.

APPENDIX XVII

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LONNIE LEE CUEVAS — PLAINTIFF

VS. — CIVIL ACTION NO. S82-0589(R)

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY — DEFENDANT

MEMORANDUM OPINION

Pending before the court are the motions of Nationwide Mutual Fire Insurance Company (Nationwide) for summary jdugment on grounds of misrepresentations made by the insured and for partial summary judgment on the issue of punitive damages.

Nationwise issued to the plaintiff a homeowners policy covering his dwelling and its contents. Approximately one month after the issuance of the policy, the plaintiff's home was destroyed by fire. Prior to issuance of the policy, both the plaintiff and his wife were allegedly asked if either had

experienced a loss within the previous five years to which both of them responded negatively. Additionally, the defendant inquired into whether the plaintiff's home would contain central air and heat to which the plaintiff responded affirmatively. After the plaintiff's fire loss, the defendant discovered that the plaintiff had experienced a total of three fire losses on the same slab and received insurance proceeds on two of the three losses. In addition, the defendant learned that the plaintiff's home contained space heaters as opposed to central air and heat.

The defendant asserts that these misrepresentations are material and are sufficient to void the policy. Don Petriskie, defendant's underwriting supervisor, testified by affidavit that Nationwide would not have issued coverage if it had been informed of the prior fire losses and the absence of central air and heat.

It has been held by Mississippi courts that where the insured induces the insurance company to accept his application and issue his policy by way of fraudulent misrepresentation, the policy may be declared void by the company. See Tolar v. Bankers Trust Savings and Loan Assn., 363 So 2d 732(Miss. 1978). However, before the policy may be voided, the insurance company must show not only that misrepresentations were made, but also that they were material and that they were relied upon by the company. See Home Ins. Co. v. Olmstead, 355 So 2d 310 (Miss. 1978); Southeastern Fidelity Ins. Co. v. Gann, 340 So 2d 429 (Miss. 1976); Reserve Life Ins. Co. v. Brunson, 172 So 2d 571 (Miss. 1965).

In his sworn statement, the plaintiff represents that he does not recall having been asked about previous fire losses. The plaintiff's wife who completed the application admits that she was asked about prior

losses but she knew of none; the plaintiff in his deposition states that he never told his wife of the prior fires.

On grounds that there exist issues of material fact as to whether misrepresentations were made, their materiality, and the defendant's reliance upon them, the Court denies the defendant's motion for summary judgment.

Alternatively, the defendant asks that partial summary judgment be granted dismissing the plaintiff's claim for punitive damages. The defendant contends that it found sufficient evidence of an incendiary origin, motive, and opportunity to justify its denial of the plaintiff's claim. After reviewing the evidence submitted by the defendant, the Court concludes that the motion for partial summary must be denied at this time. The defendant may, of course, raise this issue at trial. The Court reminds the defendant that a punitive damage

instruction will not be granted unless sufficient evidence has been presented.

The defendant further argues that partial summary judgment is proper on the issue of punitive damages as they are barred by Miss. Code Ann. § 15-1-35 (1983) which is the one year statute of limitations governing intentional torts. The defendant's argument is that in actions for tortious breach of an insurance contract, punitive damages are not recoverable unless the insurer's breach of contract is attended by "an intentional wrong, insult, abuse, or such gross negligence as amounts to an independent tort." Gulf Guaranty Life Ins. Co. v. Kelley, 389 So 2d 920 (Miss. 1980). Therefore, the one year statute of limitations governing intentional torts would apply and since the fire loss in the instant case occurred on March 31, 1980, and suit was filed on August 18, 1982, the plaintiff's punitive damage claim is time barred.

In response, the plaintiff contends that § 15-1-35 contains an inclusive listing of intentional torts subject to the one year statute of limitations and that Miss. Code Ann. § 15-1-49, the catch-all six year statute of limitations, applies to an action for the commission of tortious breach of an insurance contract in which punitive damages are requested.

The theory which results in reliance upon Miss. Code Ann. § 15-1-35 (1982) is the standard for an award of punitive damages. This standard has been most recently enunciated as follows: "[p]unitive damages are not recoverable for the breach of a contract unless such breach is attended by intentional wrong, insult, abuse, or such gross negligence as to consist of an independent tort". Consolidated American Life Ins. Co. v. Toche, 410 So 2d 1303, 1304 (Miss. 1982); Standard Life Ins. Co. v. Veal, 354 So 2d 239,247(Miss. 1977); Progressive Casualty

Ins. Co. v. Keyes, 317 So 2d 396 (Miss. 1975). In earlier cases the language was substantially the same; the court merely used the word "tort" in lieu of "independent tort." D.L. Fair Lumber Co. v. Weems, 16 So 2d 770, 773 (Miss. 1944); American Railway Express Co. v. Bailey, 107 So 761, 763 (Miss. 1926). In arguing for the application of § 15-1-35, the defendant equates "independent tort" with "intentional tort." However, the Court is of the opinion that the term "independent tort" embraces all torts, not merely intentional ones. Application of § 15-1-35 to a plaintiff's request for punitive damages where the insurer's tortious breach of an insurance contract was attended by only gross negligence would be overly restrictive and would result in misapplication of a clear legislative intent.

The Court is not unaware of the case of Short v. Metropolitan Life Ins. Co.,

No. S82-0012(N) (S.D. Miss. Sept. 2, 1982). While the court addressed this issue and stated that the one year statute of limitations would be applicable to the plaintiff's claim for punitive damages, this assertion was merely dictum; it was not necessary to "reach a decision on the statute of limitations issue to reach a final disposition of this cause." Short v. Metropolitan Life Ins. Co., slip op. at 6.

Thus, it is the opinion of this Court that the one year limitation found in § 15-1-35 had no application to a plaintiff's action for tortious breach of an insurance contract in which punitive damages are requested.[1]

The defendant's motion for summary judgment or in the alternative for partial summary judgment is hereby denied. An order in accordance with the opinion of this Court shall be submitted in accordance with the Local Rules. This the 25th day of February, 1984.

Dan M. Russell, Jr.

UNITED STATES DISTRICT JUDGE

NOTE

1. The defendant, by citing the Court to Vidrine v. Enger, No. S80-0364(C) (S.D. Miss. Sept. 8, 1983), argues that the plaintiff's claim for punitive damages is barred by Miss. Code Ann. § 15-1-33(1972) which provides that "[a]ll actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeitire is given, in whole or in part, shall be commenced within one year next after the offense was committed..." The defendant argues that since punitive damages are in the nature of a punishment, Fowler Butane Gas Co. v. Varner, 141 So 2d 226 (Miss. 1962), then by virtue of § 15-1-33 the plaintiff's claim for punitive damages is barred.

However, "this section reveals by its plain terms that it applies only to suits for any penalty or forfeiture based on a penal statute..." Latham v. United States Fidelity & Guaranty Co., 267 So 2d 895, 897 (Miss. 1972). The instant action is not based upon any such penal statute. Thus, § 15-1-33 has no application here.

APPENDIX XVIII

SIBYL HARRISON, Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 81-2501.

United States Court of Appeals,

Fifth Circuit.

July 5, 1983.

Woman appealed from dismissal by the United States District Court for the Eastern District of Texas, William Wayne Justice, Chief Judge, of her suit under federal Tort Claims Act as barred by statute of limitations. The Court of Appeals, Politz, Circuit Judge, held that statute of limitations was tolled during time that critical medical records were purposely suppressed and kept from woman.

Reversed and remanded.

1. Limitation of Actions - 95(1)

Two-year statute of limitations in Federal Tort Claims Act for malpractice does not begin to run until plaintiff has knowledge of factual predicate for malpractice, that is, fact of his injury and its cause. 28 U.S.C.A. §2401(b).

2. Limitation of Actions - 95(1)

Plaintiff in medical malpractice case need not have knowledge of fault in legal sense for statute of limitations to run, but she must have knowledge of facts that would lead reasonable person to conclude that there was causal connection between treatment and injury or, to seek professional advice, and, with that advice, to conclude that there was causal connection between treatment and injury.

3. Limitations of Actions - 95(1), 104(1)

Where prior to time woman received copies of her medical records, myriad medical and legal experts could not express

reasoned opinion that cause of her impairment was error in medical procedures conducted at Air Force base hospital, and critical records were purposely suppressed for nearly a decade, two-year statute of limitations in Federal Tort Claims Act for bringing medical malpractice action was tolled. 28 U.S.C.A. §2401(b).

4. Limitation of Actions - 195(5)

When plaintiff shows that defendant has actively worked to conceal information about plaintiff's injury or its cause, defendant bears heavier than normal burden in showing that plaintiff possessed level of knowledge required to commence accrual of period of limitations.

5. Fraud - 16

Silence may constitute fraudulent concealment in instance of fiduciary relationship such as that which would exist between doctor and patient.

Appeal from the United States District Court for the Eastern District of Texas.

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

Sibyl Harrison's headaches began in 1962. They continue to this day--the pain amplified by the dismissal of her suit under the Federal Tort Claims Act as barred by the statute of limitations.

As the wife of a retired airman, Harrison sought medical treatment in December 1966 at Wilford Hall Hospital, Lackland Air Force Base, San Antonio. Doctors Benjamin Allen and Richard Ashby, Air Force mecical officers, suspecting a brain tumor, decided to perform a ventriculogram and pneumoencephalogram. These very painful procedures involve the introduction of air into the brain and spinal cord, respectively, as a part of x-ray examination of the brain.

During the examination Harrison was placed in a special chair which could be positioned to permit the doctors to control the movement of the air bubble. Typically, the back of the chair is dropped, the patient is placed first in a supine position and is then rotated upside down. When the x-rays from the ventriculogram proved inconclusive, the doctors injected an air bubble into Harrison's spine. The needle used in the ventriculogram was left in Harrison's skull during the subsequent procedure.

During the course of the tests and while the chair was being moved, Harrison lost consciousness. Upon reviving, she noted a slight numbness in her arm, a condition the doctors described as a normal reaction to the tests. Other patients informed Harrison that they, too, had experienced transient numbness. As anticipated, Harrison's numbness soon disappeared.

In the ensuing years Harrison suffered from the left frontal headaches which had first caused her to seek help at Wilford Hall. In addition, she experienced speech impairment, loss of memory and a burning sensation on the left side of her face. She consulted several doctors; none could help. By 1968 she was under the care of Dr. Thomas Nash, a private physician. He could not identify the cause of Harrison's difficulties and referred her to St. Paul Hospital for extensive testing. In a letter to a colleague, Nash wrote: "I cannot make a definitive diagnosis .... It certainly is one of the most bizarre and unusual cases I have seen."

The tests conducted at St. Paul Hospital indicated a possible answer to the mystery--Harrison had an acoustic brain tumor. In June 1968, Dr. Charles Simpson surgically removed a portion of the tumor. The location of the tumor prevented complete excision

and the possibility of regrowth remained.

The abatement of Harrison's pain was short-lived. The headaches, numbness, paralysis and burning sensation returned and were increasingly painful. Her life began to disintegrate. Constant pain forced closure of her small flower shop and interfered with her efforts to care for her invalid husband. Desparate to find an explanation for her suffering, Harrison became convinced that the tumor was growing anew. She returned to Simpson every other month for two years, insisting on x-rays of the tumor. No new growth was found. Though unable to identify the source of Harrison's pain, Simpson assured her that it was not the tumor. He refused to conduct further x-ray examinations, telling her "I'm going to burn your brain up." On the basis of what he then knew of Harrison's medical condition and history, including

information received from Allen and Ashby, Simpson concluded that Harrison would never recover. He finally told her "You've bought the farm. It's yours. You're going to have it from now on."

During this period, in her desperation, Harrison grasped at a new theory for her pain--the doctors at Wilford Hall had damaged her brain. Just as she had earlier believed that the tumor was growing wildly in her head, she now came to the view that Wilford Hall was the source of her difficulty. She took this suspicion to Simpson who rejected it. Harrison sought legal counsel.

Harrison told her attorney, Leslie Echols, that she believed the doctors at Wilford Hall were responsible for her difficulties. Pressed for supporting data, Harrison could only share her speculation. Echols found no medical evidence and no rational basis for Harrison's intuitive conclusion. Indeed the evidence then avail-

able--the written opinions of the legion of doctors Harrison had consulted, suggested that the care at Wilford Hall had been the best possible. Echols declined to proceed further.

Harrison was undaunted. She tried to obtain copies of her medical records from Wilford Hall. When she ran into a stone wall, she again sought Echols' assistance. He reluctantly agreed to make another effort. In December 1973 Echols traveled to Dallas in the hope that Dr. Simpson would shed some light. When Simpson told senior attorney Echols' "Son. You're doing nothing but chasing rabbits," Echols redoubled his efforts. He paid a personal visit to Wilford Hall. The Clinical Records Librarian informed Echols that she could not then locate the records but that she would check further and contact him. She did not do so. Echols' repeated attempts to communicate with the records librarian were signally unsuccessful.

In the meantime, Simpson referred Harrison to Duke University Hospital, for help in determining the cause of her pain. The experts there were unable to define the cause of the pain, ruled out brain surgery as too risky, and expressed the opinion that the condition was permanent. Once again, Harrison was stymied. The best medical advice she could secure was of no assistance in pinpointing the cause of her difficulty.

By the end of 1974, at Simpson's suggestion, Harrison visited a psychiatrist. Simpson was of the opinion that Harrison had become addicted to the medication given for palliation of the pain and thought she might benefit from psychiatric assistance. In discussing the history of her illness with the psychiatrist, Harrison focused on a new theory: when he removed the excisable portion of the tumor, Dr. Simpson had sliced through her brain causing all of her ailments. As with the prior theories, available medical

evidence did not support Harrison's belief.

After his efforts at Wilford Hall produced nothing, not even response to his inquiries, Echols reported to Harrison and commented that she might have better luck writing to the President of the United States. Harrison wrote.

The President responded. Harrison received a letter from a Colonel, who wrote on behalf of the President to advise that her letter had been placed "in the hands of appropriate officials for their careful consideration." Harrison heard further, by letter dated July 26, 1975, from Colonel L. E. Seminare, Jr. The letter stated:

> Authorities in the Office of the Surgeon General, USAF, reviewed your inpatient records from Wilford Hall and found no evidence of mismanagement in your case .... Your records show no evidence of any difficulties being encountered during the procedure.

Echols was puzzled. From the information he had been furnished, the records were

not in Washington, D. C. The letter, however, suggested they were. Echols headed for Washington. He went to the Pentagon and spoke to a Lieutenant who told him the records were across town at the Forrestal Building. A Lt. Colonel at the Forrestal Building advised Echols that the records were at a nearby Andrews Air Force Base. A Captain there told Echols his client's records were in St. Louis. Echols returned to Paris, Texas.

In February 1976, Echols received an unexpected telephone call from a Colonel at Lackland advising that the files had been found and were being mailed immediately. Weeks passed. Echols telephoned the Colonel who stated that the records had inexplicably disappeared but vowed to track them down. Months passed.

On July 23, 1976 the records finally arrived. Echols took them to Simpson. In less than a minute the decade-old mystery

of Sibyl Harrison's enigmatic difficulties was solved: During the course of the tests at Wilford Hall the needle from the ventriculogram had plunged into the center of Sibyl Harrison's brain. Before beginning the spinal puncture Ashby and Allen had neglected to remove or secure the needle, or replace it with a safer, more flexible needle. While Harrison was being turned about, the needle was driven into her thalamus. Simpson perceived Allen's contemporaneous medical notes as "clear-cut evidence that Harrison's thalamic pain is due to the ventricular needle having been placed in the thalamus from whence developed a thalamic scar which is the cause of pain."

It is appropriate to inquire why the source of Harrison's problems eluded so many doctors. That inquiry is relevant to the issue before us today. First, the thalamus is located toward the center of the brain, away from the area in which air

would be introduced during a ventriculogram. It would be an extremely unusual occurrence to pierce the thalamus during that procedure.

Second, Simpson and all of the other doctors were told by Allen and Ashby that the tests were properly performed. Before removing Harrison's tumor in 1968 Simpson wrote Allen and Ashby, requesting the x-rays and a full account of the tests performed at Wilford Hall, Ashby and Allen did not release the x-rays; instead they assured Simpson that "the only abnormality we ever found was that the right cerebellar pontine angle failed to fill." That abnormality was totally unrelated to the thalamic injury. To suggest that the representation by Ashby and Allen was merely less than candid would be unjustifiably kind. The x-rays clearly revealed that the needle had penetrated the thalamus. Further, immediately after

receiving the x-rays Allen and Ashby discussed the damage that had been caused to the thalamus. Finally, the "work-up," which Ashby purported to be a complete summary of the tests, made no mention of the thalamic insult, despite the fact that notes taken by Allen at the time of the ventriculogram revealed the true nature of the damage: "x-rays demonstrated that tip of ventricular needle is penetrating floor of ... thalamus."

Third, Harrison was unable to provide any persuasive information that might have given a clue as to what had happened at Wilford Hall. She was not conversant with the procedure. She told of her beliefs but she could only report that the chair dropped backwards, a normal movement since the chair was designed to first lay the patient supine and then tilt the patient upside down as a means of directing the movement of the air bubble.

Fourth, Harrison's headaches predated the Wilford Hall incident and were compounded after Wilford Hall by other complications including an acoustic brain tumor, brain surgery, drug addiction, exposure to large amounts of x-rays, and a variety of emotional problems.

Fifth, the only direct evidence of a thalamic injury was contained in the x-rays done at Wilford Hall. Without those x-rays, or accurate reports based on that x-ray evidence, the doctors could do no more than speculate as to the possible source and cause of Harrison's problems. These critical x-rays were purposely suppressed for nearly a decade. They were not overlooked--they were hidden from view.

THE LAW

(1,2) The Federal Tort Claims Act prescribes a two year statute of limitations. 28 U.S.C. §2401(b). The period does not

begin to accrue until the plaintiff has "knowledge of the 'factual predicate for a malpractice claim,' i.e., 'the fact of his injury and its cause.'" Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir.1980) (quoting United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). As stated by our colleagues in the Seventh Circuit: "In medical malpractice cases ... the statute of limitations does not begin to run until after the patient discovers or in the exercise of reasonable diligence should discover his injury and its cause." Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir.1980). The plaintiff need not have knowledge of fault in the legal sense for the statute to begin to run, but she must have knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury or (b) to seek professional advice, and then, with that advice, to

conclude that there was a causal connection between the treatment and injury. The district court held that Sibyl Harrison was aware of the facts of her injury and their cause sometime before September 20, 1974. Since she did not file suit until September 20, 1976, her claim was considered barred.

In assessing the awareness required to trigger the statute of limitations, it is essential to distinguish between "knowledge" and "belief." For one to have knowledge of fact "x", three requisites must exist: (1) "x" must be true, (2) the person must believe "x" to be true, and (3) the belief must be reasonably based. A. Flew, A Dictionary of Philosophy (1979); A. Quinton, "Knowledge and Belief," Encyclopedia of Philosophy (1967). "Belief," which is a component of knowledge, requires only requisites (1) and (2)--"x" must be true and the person must believe it to be true. As

a consequence, conclusions based on dreams, intuitions, suspicion, conjecture, ESP, speculation, or faulty reasoning, even if true, are merely "belief." Absent a reasonable basis, these conclusions do not rise to the level of "knowledge."

The distinction between knowledge and mere belief has long been recognized by the courts, implicitly if not explicitly. In Tracerlab, Inc. v. Industrial Nucleonics, 313 F.2d 97, 102 (1st Cir.1963), the court observed:

> The 'personal knowledge' in Sanborn v. Gale, 162 Mass. 412, 38 N.E.2d 710 (1894) must be compared with the present case where the plaintiff did not know any facts and had only 'rumor,' 'suspicion,' 'guesses,' and 'surmises.'.... Suspicion and knowledge are poles apart on a continuum of understanding.

(3) Prior to July 1976, Harrison had only a belief. She could not know the basis for her injury. The myriad medical and legal experts could not express a reasoned

opinion that the cause of her impairment was an error in the medical procedure conducted at Wilford Hall. They could not relate causally her difficulties and Wilford Hall. It is not reasonable to suggest that before gaining access to her records Harrison possessed the requisite knowledge of the cause of her condition when doctors who knew immeasurably more than her were stymied and freely admitted their bewilderment. It would be unreasonable to hold Harrison to a higher degree of medical competence and understanding than the many medical experts she consulted.

Harrison's suspicion or belief that her problems dated from Wilford Hall was merely one of a series of explanations that she seized upon in anguish and desspersation to explain her illness. Her privately conceived notions did not become knowledge until July 1976 when she received

copies of her medical records. Only then was she in a position to know that her difficulties were caused by a slip in the procedures at Wilford Hall. See Aerojet-General Shipyards, Inc. v. O'Keeffe, 413 F.2d 793 (5th Cir.1969).

(4,5) The situation Harrison faced is exactly the type of situation referred to by Justice White in United States v. Kubrick, when he observed that "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122, 100 S.Ct. at 359. In such an instance, other conditions being met, the statute of limitations is tolled.[1]

REVERSED AND REMANDED.

1. Because of our disposition of this appeal we need not resolve the issue of fraudulent concealment which is inherent in the factual situation presented herein. We merely note

that limitations is an affirmative defense with the defendant generally bearing only a modest burden of proof. Typically, one merely views the date suit is filed in light of the date of the occurrence. But that simple situation does not apply when equitable considerations are urged as an offset to the limitations bar. Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir.1971). When, as here, the plaintiff shows that a defendant has actively worked to conceal information about plaintiff's injury or its cause, the defendant bears a heavier burden in showing that the plaintiff possessed the level of knowledge required to commence accrual of the period of limitations. Compare, Barrett v. United States, 689 F.2d 324 (2d Cir.1982); Fitzgerald v. Seamans, 553 F.2d 220 (D.C.Cir.1977). In addition to the active concealment by Allen and Ashby, there is the additional dimension of concealment following from their failure to advise Harrison of the injury. Silence may constitute fraudulent concealment in the instance of a fiduciary relationship such as that which exists between doctor and patient. Nardone v. Reynolds, 538 F.2d 1131 (5th Cir.1976); Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y.1979).